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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-709

RIALTO THEATRE COMPANY,
a Delaware Corporation, and
RICHARD F. LEWIS, JR.,

Petitioners,

v.

CITY OF WILMINGTON, a Delaware Municipal Corporation,
HARRY G. HASKELL, JR., Mayor of the City of Wilmington,
WILLIAM J. O'ROURKE, Safety Commissioner of the City of Wilmington, and
JOHN T. McCOOL, Chief of Police of the City of Wilmington,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-709.

RIALTO THEATRE COMPANY,
A DELAWARE CORPORATION, AND
RICHARD F. LEWIS, JR.,
Petitioners

v.

CITY OF WILMINGTON, A DELAWARE MUNICIPAL CORPORATION,
HARRY G. HASKELL, JR., MAYOR OF THE CITY OF WILMINGTON,
WILLIAM J. O'ROURKE, SAFETY COMMISSIONER OF THE CITY OF WILMINGTON, AND
JOHN T. McCOOL, CHIEF OF POLICE OF THE CITY OF WILMINGTON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioners, Rialto Theatre Company, a Delaware corporation (Rialto), and Richard F. Lewis, Jr. (Lewis), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 19, 1972.

OPINION BELOW.

The opinion of the Court of Appeals is reported at 460 F.(2d) 281 (1972) and appears in the Appendix hereto. A prior opinion in this case relevant here is reported at 440 F. (2d) 1326 and appears in the Appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on May 19, 1972. This petition for certiorari was filed within the period of sixty (60) days' extension granted prior to the expiration of ninety (90) days from the date of the entry of the judgment of the Court of Appeals upon petitioners' application by order of Mr. Justice William J. Brennan, Jr., dated September 10, 1972, a copy of which appears in the Appendix hereto. This Court's jurisdiction is invoked under 28 *U. S. C.* § 1254(1).

QUESTION PRESENTED.

1. Whether a federal court may require a litigant to deprive a third person of his property in violation of a contract between the litigant and the third party where the third party is not subject to the court's jurisdiction.

CONSTITUTIONAL PROVISION INVOLVED.

The constitutional provision involved is the due process clause of the Fifth Amendment.

STATEMENT OF THE CASE.

In March, 1970, several Wilmington Police officers viewed certain films shown at the Rialto Theatre in Wilmington, Delaware. Shortly thereafter, pursuant to a search warrant and an arrest warrant, the Wilmington Police officers seized the films in question and arrested Lewis for violations of the Wilmington Obscenity Ordinance (A4-6).

Petitioners filed an action in the Delaware District Court, charging violations of 42 *U. S. C.* § 1983, seeking *inter alia* the return of the films seized, and alleging that the seizure violated petitioners' First Amendment rights. The District Court, after hearing, directed the return of such films, on condition that petitioners retain them for use by the Wilmington City Solicitor as evidence in Lewis' prosecution (A3-16).

The films seized were licensed by petitioners and the licensing agreement required their return within a very short period. The District Court held, in substance, that the return of the films to petitioners vindicated their First Amendment rights. The Court of Appeals reversed, holding that the constitutionality of the questioned seizure was a matter for determination in the State Court proceedings after the *Younger v. Harris* series (A19) denied the right of federal courts to intervene where State prosecution had commenced. The Court of Appeals stated that it expressed no opinion as to the constitutionality of the seizure of these films. *Rialto Theatre, et al. v. City of Wilmington, et al.*, 440 F. (2d) 1326, 1327 (A17-21).

REASONS FOR GRANTING THE WRIT.

1. The decision below conflicts in principle with the decisions of other Courts of Appeals regarding return of films seized in similar cases alleging violations of First Amendment rights.

The Third Circuit held that return to the status quo prior to the District Court's order (which had been reversed in *Rialto, supra*) to insure the films' availability to the Delaware Courts by subpoena or search warrant was proper and that the District Court had complied with the Third Circuit's mandate by requiring redelivery to the Wilmington City Solicitor upon request for Lewis' prosecution.

The order of the District Court, affirmed by the Third Circuit decision appealed, makes two erroneous assumptions: (1) petitioners owned the films seized which were ordered returned to the Wilmington City Solicitor and (2) the films were, at the time of that order, in the possession of one of the petitioners. In fact, neither petitioner owned the films or had any special property in said films, having at best a very short (less than one week) license in 1970 requiring the films' return to the distributor long before entry of the District Court's order. Petitioners' returning these films to the distributor was required by the licensing agreement between petitioners and the distributor.

Relying on the *Younger v. Harris* series, the Third Circuit affirmed the District Court's order requiring action by petitioners which was impossible at the time the order was entered because petitioners did not possess the films, had no property right in the films, and, therefore, no right to their possession.

The Third Circuit decision affirming the District Court's order and the District Court's order purport to follow the decisions in *Metzger v. Pearcy*, 393 F.(2d) 202

(C. A. 7) and *Tyrone, Inc. v. Wilkinson*, 410 F.(2d) 639 (C. A. 4). Yet in both cases the films ordered redelivered to local prosecuting authorities were owned by the exhibitors securing their return under the conditional court orders.

2. The decision below conflicts in principle with a prior decision of this Court.

In *Thompson v. City of Louisville*, 362 U. S. 199, this Court held it a violation of due process to convict a defendant without any evidence to support the conviction. It is also a due process violation to enter an order requiring a litigant to take action with respect to delivery of property possible only where such litigant legally owns or controls such property, when the record clearly demonstrates absence of both ownership and control.

Here, petitioners were ordered to take action with respect to property which they did not own, did not have in their possession and did not otherwise legally control. The Third Circuit has, in effect, required petitioners to restore a broken eggshell. Additionally, the District Court held no hearing to determine the status of the property on which its order operated before entry of the order approved by the decision below.

Nothing in the *Younger v. Harris* series indicates that a Court may summarily order a particular action without any evidence to support the order or any basis for determining the possibility of compliance with such order. The decision below merely approves a District Court order, entered without any realistic relation to the status of the subject property and without attempting to inquire concerning that status. The *Younger v. Harris* series could not by possibility justify such departure from required orderly judicial procedure. The order affirmed by the decision below is totally inconsistent with any concept of procedural or substantive due process.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

WILLIAM E. TAYLOR, JR.,
500 Continental American Building,
Wilmington, Delaware. 19801
Counsel for Petitioners.

Dated: November 13, 1972.

Appendix

ORDER OF U. S. DISTRICT COURT DATED MARCH 31, 1970.

And Now to Wit, this 31st day of March, 1970, plaintiffs' applications for a temporary restraining order and other relief having come on for a hearing on this date, after notice, and the parties having agreed at the hearing to consider this proceeding as a hearing on plaintiffs' request for a preliminary injunction and the Court having considered the complaint and affidavits filed and heard counsel for the respective parties and finding that it has jurisdiction of this action under 28 U. S. C. § 1343(3), 42 U. S. C. § 1983 and under the First, Fourth and Fourteenth Amendments of the United States Constitution, Hague v. C. I. O., 307 U. S. 496 (1939); Douglas v. Jeannette, 319 U. S. 157 (1943), it is

Ordered

1. The suit is hereby dismissed as to the defendant, City of Wilmington, for failure to state a claim upon which relief may be given. The City of Wilmington is not a "person" within the meaning of that term as used in 42 U. S. C. § 1983. Monroe v. Pape, 365 U. S. 167 (1961); United States ex rel. Gittlemacker v. County of Philadelphia, 413 F. 2d 84 (C. A. 3, 1969).

2. Plaintiffs' application that a request be made to the Chief Judge of the Court of Appeals for the Third Circuit to convene a three-judge district court in accordance with the provisions of 28 U. S. C. §§ 2281-2284 is hereby denied because said provisions are inapplicable to a suit, such as this, which challenges the constitutionality of a local ordinance. Ex Parte Collins, 277 U. S. 565 (1928); Ex Parte Public National Bank, 278 U. S. 101 (1928).

3. Defendants are hereby directed to return forthwith to the plaintiffs the Film Trailers advertising "Ride, Mister" and "Potpurri". These Film Trailers were impermissibly seized by the defendants because there had not been an adversary judicial hearing and determination of obscenity before a warrant issued to seize the alleged obscene material as required by the First and Fourteenth Amendments of the Constitution of the United States.

It is further ordered that plaintiffs shall deliver to the Solicitor of the City of Wilmington, defendants' counsel, upon his request a print of said Film Trailers for his reasonable use in the trials of, or in the preparation for trials, of criminal cases involving such film trailers pending in the Municipal Court of the City of Wilmington. Cambist Films, Inc. v. Duggan et al., — F. 2d — (C. A. 3, Dec. 30, 1969—Slip Opinion); Tyrone, Inc. v. Wilkinson, 410 F. 2d 639 (C. A. 4, 1969); Metzger v. Pearcy, 393 F. 2d 202 (C. A. 7, 1968).

4. Plaintiffs' application to adjudge and declare "An Ordinance Prohibiting Obscene Writings, Pictures, Publications, Plays, Dances, or The Exhibition of Obscene Material" of the City of Wilmington (Sub No. 1 to Ord. 69-166), approved January 23, 1970, unconstitutional on the grounds that it abridges plaintiffs' rights of freedom of speech and is impermissibly vague, indefinite and overbroad, is hereby denied. The challenged Ordinance follows the language of the United States Supreme Court in Roth v. United States, 354 U. S. 476 (1957) and provides an adequate standard for judging the alleged obscenity of material in question. See Footnote 8, Grove Press Inc. v. City of Philadelphia, 418 F. 2d 82, 89 (1969).

/s/ James L. Latchum,

United States District Court Judge.

AMENDED AND SUPPLEMENTAL COMPLAINT

(Jury Trial Demanded).

Plaintiffs allege as follows:

1. Jurisdiction of this Court over this action is invoked under 28 U. S. C. § 1331(a). The matter in controversy exceeds, exclusive of interest and costs, the sum or value of Ten Thousand Dollars ($10,000), and arises under the Constitution and laws of the United States, and particularly under the First, Fourth and Fourteenth Amendments of the United States Constitution.

2. This is also an action to redress by injunctive relief the deprivation, under color of state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured to plaintiffs by the Constitution of the United States and particularly the First, Fourth and Fourteenth Amendments thereto. 42 U. S. C. § 1983.

3. Jurisdiction of this Court is, therefore, further invoked under 28 U. S. C. § 1343(3), (4), this being an action, as aforesaid, authorized by the laws of the United States to redress by an action for injunctive relief the deprivation, under color of state law, ordinance, custom or usage, of rights, privileges and immunities and equal protection of law secured to plaintiffs by the Constitution and the laws of the United States, particularly the First, Fourth and Fourteenth Amendments thereto.

4. Plaintiffs seek an adjudication and declaration of their rights under the Constitution and the laws of the United States under 28 U. S. C. §§ 2201, 2202. This Court in a case presenting an actual justiciable controversy may adjudge and declare such rights.

5. Defendant HARRY G. HASKELL, JR. is Mayor of the City of Wilmington. Defendant VICTOR F. BATTAGLIA is City Solicitor of the City of Wilmington. Defendant WILLIAM J. O'ROURKE is Safety Commissioner of the City of Wilmington. Defendant JOHN T. McCOOL is Chief of Police of the City of Wilmington.

6. Plaintiff, RIALTO THEATRE COMPANY (RIALTO), operates the Rialto Theatre at 220 Market Street in the City of Wilmington. Plaintiff, RICHARD F. LEWIS, JR., (LEWIS), is the owner of RIALTO and operates and manages said theatre under a contract and lease with the owner of said premises at 220 Market Street in the City of Wilmington.

7. Prior to March 18, 1970, RIALTO entered into certain licensing agreements with distributors to show certain films titled, among others, "Ride, Mister" and "Potpourri" at said theatre. In conjunction with said licensing and distribution agreements and prior to their full-length showing, Plaintiffs were furnished trailer films or excerpts of coming attractions to be shown with the feature films which plaintiffs had contracted and were licensed and required to exhibit at said theatre.

8. Beginning on or about March 18, 1970 and continuing through the last showing on March 19, 1970 of the then playing feature films at the Rialto Theatre plaintiffs had been exhibiting trailer films of the aforesaid coming attractions. Said trailer films were the same kind and class of films then showing as the feature films.

9. Plaintiffs believe the feature films then being shown and the trailer films relating to coming attractions were and are within the customary limits of candor. Plaintiffs believe that these films are within the protection of the free speech and expression provisions of the First and Fourteenth Amendments of the United States Constitution,

and that taken as a whole these feature films and trailers have social importance. Plaintiffs also believe that the predominant appeal of these feature films and trailers, taken as a whole, is not to the prurient interests of the average person.

10. On or about March 19, 1970 Alfred J. Fraczkowski, an Associate Judge of the Municipal Court of the City of Wilmington (JUDGE FRACZKOWSKI), issued a warrant for the arrest of plaintiff LEWIS based upon the sworn complaint of Edward Carter, a police officer of the City of Wilmington, alleged to be a member of the Vice Squad of the Police Department of said City (CARTER), which said complaint alleged a violation of a Wilmington Ordinance (being substitute No. 1 to Ordinance 69-166, a copy of which is attached to plaintiffs' Complaint and incorporated herein by reference, "Wilmington Obscenity Ordinance"), charging said film was obscene under the terms of said Wilmington Obscenity Ordinance; at the same time JUDGE FRACZKOWSKI also issued a search warrant authorizing the seizure of said trailer films from the possession of the plaintiffs. Plaintiff LEWIS' arrest and the seizure of said films occurred in the early evening of March 19, 1970. Said films remained in the custody of some of the defendants, until returned to the plaintiffs by the requirement of this Court's order dated March 31, 1970.

11. For a number of months prior to March 19, 1970 CARTER and other Wilmington Police Officers (POLICE) have been visiting the Rialto Theatre with reasonable regularity and observing the feature films and trailer films playing at said theatre at the time of their visits. The use of trailer films of coming attractions in conjunction with the feature films currently showing is an established

and normal practice in the theatre industry among all exhibitors of any kinds or classes of pictures.

12. During and after the various visits by various Wilmington Police Officers to the Rialto Theatre prior to March 19, 1970 plaintiff LEWIS has discussed the films being shown with various POLICE, requested their comments and in most, if not all, instances, was assured that the films being shown were satisfactory and not prohibited by law, although said POLICE were not competent in law to make such determination. Prior to March 19, 1970, plaintiff LEWIS had at no time been informed that the feature films or trailer films he had been showing were in the opinion of said POLICE violating the Wilmington Obscenity Ordinance referred to in Paragraph 10 and in certain instances where a Police Officer indicated his own personal objection to portions of feature films shown from time to time at the Rialto Theatre plaintiff LEWIS deleted such portions, although without legal obligation to do so.

13. The CARTER affidavit dated March 31, 1970, filed in this action, states that on March 19, 1970 CARTER and other POLICE witnessed two feature films, as well as the trailer films of coming attractions "Ride, Mister" and "Potpourri," that thereafter CARTER made said application of a search warrant and a warrant for the arrest of plaintiff LEWIS to JUDGE FRACZKOWSKI. Although the CARTER affidavit dated March 31, 1970, recites that CARTER made application for a search warrant and arrest warrant for plaintiff LEWIS, it further recites that *inter alia* the affidavit filed with JUDGE FRACZKOWSKI recited that the trailer films being shown at the Rialto Theatre demonstrated a series of unnatural acts of sexual gratification in violation of said Wilmington Obscenity Ordinance. CARTER is a police officer who knew, or should have known, that any facts

set forth therein would have been insufficient in law to justify either the arrest warrant or the search warrant issued pursuant thereto by JUDGE FRACZKOWSKI.

14. JUDGE FRACZKOWSKI knew, or should have known, and was charged with the knowledge that applicable decisions of the Supreme Court of the United States forbade the issuance of the arrest and search warrants requested by CARTER's complaint. JUDGE FRACZKOWSKI should have refused to issue and warrants prior to an adversary judicial determination of the obscenity of the alleged trailer films or feature films, as this Court determined in its order dated March 31, 1970, holding that the films had been ". . . impermissibly seized by the defendants because there had not been an adversary judicial hearing and determination of obscenity before a warrant issued to seize the alleged obscene material as required by the First and Fourteenth Amendments of the Constitution of the United States."

15. Although this Court's order dated March 31, 1970 does not determine that the arrest warrant was also illegal, in law the arrest warrant issued for plaintiff LEWIS was impermissibly issued and plaintiff LEWIS unlawfully arrested for the reason that the CARTER complaint filed with JUDGE FRACZKOWSKI did not show probable cause as required by applicable decisions of the United States Supreme Court, and by analogy for the same reasons specified by the Court in said order with respect to the seizure of the trailer films of coming attractions, "Ride, Mister" and "Potpourri," and the Municipal Court of the City of Wilmington acquired no personal jurisdiction over the plaintiff LEWIS.

16. Plaintiffs are informed and believe and, therefore, allege that the defendant BATTAGLIA also knew, or should

have known, and was charged with knowledge of the decisions of the Supreme Court of the United States holding that the procedure followed in this case with respect to the seizure of the aforesaid trailer films and the arrest of plaintiff LEWIS violated the First, Fourth and Fourteenth Amendments of the United States Constitution, that the procedure followed here was directed and sanctioned by the defendant BATTAGLIA or his assistants in the office of the City Solicitor of the City of Wilmington and acquiesced and concurred in by the defendants HASKELL, O'ROURKE and MCCOOL.

17. Plaintiffs are informed and believe and, therefore, allege that the aforesaid course of conduct and procedure against plaintiffs LEWIS and RIALTO has been taken in bad faith and for the purpose of harassing plaintiff LEWIS to the end that it will succeed in forcing LEWIS to close the Rialto Theatre because of their persistent and repeated threats to arrest him and seize films shown at the Rialto Theatre at any time when in the judgment of the POLICE the feature films or trailer films there shown violate the aforesaid Wilmington Obscenity Ordinance and with no thought of ultimately securing a conviction of the plaintiff LEWIS under said Ordinance, all of which conduct and procedure relating to seizure of films has been determined unconstitutional by this Court's order dated March 31, 1970, and with respect to the arrest of plaintiff LEWIS is also unconstitutional and should be so determined by this Court.

18. Plaintiffs are informed and believe and, therefore, aver that the aforesaid course of action and procedure was followed by the POLICE at the direction of and under the supervision of defendant BATTAGLIA and with the acquiescence and concurrence of the defendants, HASKELL,

O'Rourke and McCool and with the assistance of Judge Fraczkowski, all in clear violation of plaintiffs' rights under the First, Fourth and Fourteenth Amendments of the United States Constitution and was also designed to intentionally and unlawfully interfere with a valid contract and lease between plaintiff Rialto and the owner of the premises at No. 220 Market Street, Wilmington, Delaware, which contract and lease is a valuable contract and lease to both the plaintiffs and owner of said premises and that the named defendants' course of conduct and procedure outlined above has caused, and will continue to cause irreparable injury and damage to plaintiffs.

19. Continued harassment, vexation, disruption and interference by defendants and Police with the normal and continuous operation of Rialto will seriously jeopardize and threaten the future economic security of plaintiffs Lewis and Rialto, with the result that Rialto will be forced to discontinue its operation of the Rialto Theatre as a similar course of conduct by defendant Battaglia, the other defendants and Police forced the Capri Art Theatre, formerly located in the 300 block of North Union Street, Wilmington, Delaware, to do, with the result that said theatre was forced to terminate its operations because it could not economically survive defendants' course of conduct outlined above. With respect to plaintiffs Rialto and Lewis such course of conduct violates their rights under the First, Fourth and Fourteenth Amendments of the United States Constitution, including free speech, due process and equal protection.

20. Plaintiffs are informed and believe and, therefore, allege that the Wilmington Obscenity Ordinance is null and void on its face and as applied to plaintiffs because it fails to provide a procedure for an adversary judicial

hearing prior to the seizure of any film or other form of recording of any art work or piece of literature without which no prosecution can take place and without which no determination of obscenity can be made, and that no limiting construction of said ordinance or other order of any Court, state or federal, can supply this deficiency in this ordinance without violating plaintiffs' rights under the First, Fourth and Fourteenth Amendments of the United States Constitution.

21. The damages caused plaintiffs by reason of the conduct of the defendants are irreparable. Although money damages cannot make the plaintiffs whole, plaintiffs have suffered money damages in the amount of Fifteen Thousand Dollars ($15,000). By reason of the fact that the conduct of the defendants was arbitrary, willful, wanton and oppressive, plaintiffs are entitled to exemplary and punitive damages in the amount of Fifty Thousand Dollars ($50,000), making a total of Sixty-five Thousand Dollars ($65,000).

WHEREFORE, plaintiffs pray that:

1. A summons issue to each of the defendants who has not already been served or entered an appearance by counsel.

2. The Court issue a temporary restraining order, enjoining and restraining the defendants, and each of them, their deputies or any other persons acting under their direction, from prosecuting plaintiff LEWIS pursuant to a warrant of arrest issued March 19, 1970 by the Honorable Alfred J. Fraczkowski, an Associate Judge of the Municipal Court of the City of Wilmington, or threatening to prosecute plaintiffs or any of their agents, servants or employees, for exhibiting any feature films or trailer films pursuant to any arrest warrants or based on any evidence

obtained by seizing films pursuant to search warrants prior to an adversary judicial hearing issued or to be issued by the Municipal Court of the City of Wilmington or any other judicial officer of the State of Delaware or any incorporated town or borough thereof empowered to issue such arrest warrants or search warrants prior to the determination of the merits of this case after trial or final hearing, or until the further order of this Court.

3. Defendants be temporarily restrained and enjoined from demanding or attempting to demand, using or attempting to use, trailer films of coming attractions of feature films, "Ride, Mister" and "Potpourri", returned to plaintiffs pursuant to this Court's order of March 31, 1970.

4. The Court adjudge and declare that the course of conduct or procedure as set forth in plaintiffs' complaint in the application to plaintiffs of the Wilmington Obscenity Ordinance is unconstitutional, void and in violation of plaintiffs' rights under the First, Fourth and Fourteenth Amendments of the United States Constitution in that the provisions of said ordinance fail to comply with the requirements of *Freedman v. Maryland,* 380 U. S. 51, 13 L. Ed. (2d) 649 (1965), and that the said Wilmington Obscenity Ordinance as so applied to plaintiffs, be declared unconstitutional, null and void.

5. This Court's order dated March 31, 1970 be modified by deleting therefrom that portion of paragraph No. 3 as follows:

> "It is further ordered that the plaintiffs shall deliver to the Solicitor of the City of Wilmington, defendants' counsel, upon his request a print of said Film Trailers for his reasonable use in the trials of, or in the prep-

aration for trials, of criminal cases involving such film trailers pending in the Municipal Court of the City of Wilmington."

because said portion of said order was entered without jurisdiction by this Court.

6. The Court adjudge and declare that the Wilmington Obscenity Ordinance is null and void on its face because it fails to provide a procedure for an adversary judicial hearing prior to the seizure of any film or other form of recording of any art work or piece of literature without which no prosecution can take place, and without which no determination of obscenity can be made and that no order of any court, state or federal, can supply the deficiency in this ordinance, without violating plaintiffs' rights under the First, Fourth and Fourteenth Amendments of the United States Constitution.

7. The Court schedule a hearing at the earliest practicable date on plaintiffs' application for a preliminary injunction, seeking to enjoin and restrain the defendants in accordance with the prayers of paragraphs Nos. 2 and 3 herein until a final hearing can be held to determine the merits of plaintiffs' claim of violation of their rights under the First, Fourth and Fourteenth Amendments of the United States Constitution and the entry of a final judgment.

8. The Court, after final hearing, permanently enjoin and restrain the defendants, their deputies or any other person acting under their direction, including their successors in office or title, or any other person acting under them or any of them, from enforcing or attempting to enforce the provisions of the Wilmington Obscenity Ordinance against plaintiffs by the course of conduct and pro-

cedure preceding and resulting in the warrant of arrest and search warrant issued on March 19, 1970 and any other procedure not in compliance with the requirements of the First, Fourth and Fourteenth Amendments of the United States Constitution in securing a prior adversary judicial determination of obscenity as required by the controlling decisions of the United States Supreme Court.

10. For damages in the sum of Fifteen Thousand Dollars and exemplary and punitive damages in the sum of Fifty Thousand Dollars ($50,000), making a total of Sixty-five Thousand Dollars ($65,000) damages.

11. For allowance of reasonable counsel fees and disbursements in conjunction with this action.

12. For such other and further relief as to this Court seems equitable.

/s/ William E. Taylor, Jr.,
William E. Taylor, Jr.,
Taylor & Lindh,
2401 Pennsylvania Avenue,
Wilmington, Delaware.
Attorneys for Plaintiffs.

STATE OF DELAWARE
NEW CASTLE COUNTY } *ss.:*

RICHARD F. LEWIS, JR., being duly sworn according to law, deposes and says that he is one of the plaintiffs in the captioned action and that the facts set forth in the foregoing Amended and Supplemental Complaint are true and correct to the best of his knowledge, information and belief.

/s/ RICHARD F. LEWIS, JR.,
Richard F. Lewis, Jr.

SWORN to and subscribed before me this 13th day of April, 1970.

/s/ WILLIAM E. TAYLOR, JR.,
Notary Public. (SEAL)

ORDER OF U. S. DISTRICT COURT DATED APRIL 28, 1970.

I. The Court, after hearing, having considered the defendants' motion to dismiss the amended and supplemental complaint on the grounds that the order of this Court, dated March 31, 1970, finally disposed of the case and no leave to amend the complaint was ever requested or granted, it is

ORDERED that defendants' motion to dismiss is denied as the order of March 31, 1970 did not finally dispose of the case or dismiss the action and alternatively, leave is hereby granted to plaintiff to file the amended and supplemental complaint pursuant to Rule 15a, F. R. C. P.

II. The Court also having considered the oral motion of plaintiffs to stay the provisions of the second paragraph of this Court's order, dated March 31, 1970 and designated "3", which reads as follows:

> "3. Defendants are hereby directed to return forthwith to the plaintiffs the Film Trailers advertising 'RIDE, MISTER' and 'POTPURRI'. These Film Trailers were impermissibly seized by the defendants because there had not been an adversary judicial hearing and determination of obscenity before a warrant issued to seize the alleged obscene material as required by the First and Fourteenth Amendments of the Constitution of the United States.
>
> "It is further ordered that the plaintiffs shall deliver to the Solicitor of the City of Wilmington, defendants' counsel, upon his request a print of said Film Trailers for his reasonable use in the trials of, or in the preparation for trials, of criminal cases involving such film trailers pending in the Municipal Court of the City of Wilmington. Cambist Films, Inc. v. Duggan et al.,

— F. 2d — (C. A. 3, Dec. 30, 1967—Slip Opinion); Tyrone, Inc. v. Wilkinson, 410 F. 2d 639 (C. A. 4, 1969); Metzger v. Pearcy, 393 F. 2d 202 (C. A. 7, 1968)."

it is

ORDERED the stay is hereby denied for the following reasons: First, this Court in no way expressed an opinion on the film trailers' admissibility in evidence. See Tyrone, Inc. v. Wilkinson, 410 F. 2d 639, 641 footnote 4 (C. A. 4, 1969). Second, no showing has been made that the plaintiffs will be immediately or irreparably damaged by denying the requested stay because the Municipal Court hearing is not scheduled until May 21, 1970 while the hearing on plaintiffs' motion for a preliminary injunction in this case will be heard on May 18, 1970.

III. FURTHER ORDERED, a hearing on plaintiffs' motion for a preliminary injunction will be heard at 10 a.m. on May 18, 1970; defendants' answer, affidavits and legal memorandum will be filed by May 5, 1970; plaintiffs' affidavits and legal memorandum will be filed by May 12, 1970; and defendants' reply affidavits and reply memorandum will be filed by May 18, 1970.

Dated: April 28, 1970.

/s/ JAMES L. LATCHUM,
United States District Court Judge.

OPINION OF THE U. S. COURT OF APPEALS.

(Filed April 19, 1971)

PER CURIAM:

In March, 1970, several officers of the Wilmington Police Department viewed certain films being exhibited at the Rialto Theatre in Wilmington, Delaware. Shortly thereafter, pursuant to a search warrant and an arrest warrant, the Wilmington Police seized the films in question and arrested appellant Lewis for violations of the Wilmington Obscenity Ordinance.

In order to vindicate the federal rights allegedly violated by the actions of the Wilmington Police, Lewis and Rialto Theatre filed a complaint in the District Court of the District of Delaware. The complaint demanded the return of the seized films, a declaration that the Wilmington Obscenity Ordinance is unconstitutional on its face, a temporary restraining order, and a preliminary injunction prohibiting the enforcement of the Ordinance against Lewis and the Rialto Theatre. The District Court dismissed the complaint but ordered that the police return the seized films to the plaintiffs on the condition that plaintiffs keep the films available so that they might be subpoenaed by the City.

Following the District Court's entry of the order of dismissal, the plaintiffs filed an amended complaint alleging substantially the same facts as they did in the original complaint, and seeking relief similar to that requested in the first complaint. However, the amended complaint alleged for the first time the existence of bad faith as the motivation underlying the City's prosecution of Lewis. In addition, the amended complaint asked the District Court to alter its original order so as to relieve the plaintiffs of the requirement that they retain possession of the allegedly obscene films. After a hearing the District Court found that the

affidavits submitted by the plaintiffs were insufficient to demonstrate bad faith on the part of the Wilmington Police, dismissed the amended complaint, and refused to modify its original order regarding the requirement that the plaintiffs retain possession of the films.

Subsequent to the judgment of the District Court, the Supreme Court decided a series of cases which clarify the guiding principles to be applied when federal courts are asked, as was done here, to interfere with the orderly disposition of the state prosecutions. See Younger v. Harris (No. 2—October Term, 1970, filed February 23, 1971); Samuels v. Mackell (Nos. 7 and 9—October Term, 1970, filed February 23, 1971); Byrne v. Karalexis (No. 83—October Term, 1970, filed February 23, 1970); Boyle v. Landry (No. 4—October Term, 1970, filed February 23, 1970); Dyson v. Stein (No. 41—October Term, 1970, filed February 23, 1971).

Applied to the circumstances of the present case, the decisions of the Supreme Court announced on February 23, 1971 make it clear that the District Court properly dismissed both the original and amended complaint. However, the portion of the District Court's order requiring the City to return the seized films may have been an improper federal interference with a state prosecution. Accordingly, the case will be remanded to the District Court so that it may revise its order so as to conform to the principles enunciated in the Younger v. Harris series of cases, and to initiate whatever action is appropriate to return the parties to the status quo existing prior to the Court's original order.[1]

1. We express no view as to the constitutionality of the seizure of the films in question. See, for example, Cambist Films, Inc. v. Duggan, 420 F. 2d 687 (3rd Cir. 1969). If any of the plaintiffs' rights have been violated during their criminal trial, the State Courts should provide an adequate forum for the vindication of such rights according to established doctrines of constitutional law.

OPINION OF THE U. S. COURT OF APPEALS.

(Filed May 19, 1972)

PER CURIAM

Appellants seek review of an order of the district court requiring them to furnish to the City Solicitor of the City of Wilmington a copy of certain films needed as evidence in a pending criminal prosecution. The case, which originated as a suit to enjoin prosecution under an ordinance of the City of Wilmington prohibiting exhibition of obscene materials, was before us heretofore. *Rialto Theatre Company v. City of Wilmington*, 440 F. 2d 1326 (3d Cir. 1971). In that case we held that the district court had properly dismissed both the original and an amended complaint, but that the portion of the district court's order requiring the City to return films seized pursuant to a search warrant may have been an improper federal interference with a state prosecution. We remanded so that the district court could revise its order to conform to the principles enunciated in *Perez v. Ledesma*, 401 U. S. 82 (1971). *See also Younger v. Harris*, 401 U. S. 37, (1971); *Samuels v. Mackell*, 401 U. S. 66 (1971); *Boyle v. Landry*, 401 U. S. 77 (1971); *Dyson v. Stein*, 401 U. S. 200 (1971); *Byrne v. Karalexis*, 401 U. S. 216 (1971).

A return to the status quo prior to the district court's order was necessary in order to prevent the removal of the films beyond the reach of a Delaware subpoena or warrant for seizure. On remand the district court complied with our mandate by ordering a return to the status quo ante in which the City Solicitor of Wilmington had possession of the films as a result of a seizure pursuant to a warrant. The appeal from this order presents the same issues that were considered in our prior decision. We said then, and we reiterate, that we express no view as to the constitution-

ality of the warrant seizure. Any such issue may be raised in the pending Delaware prosecution. *See Perez v. Ledesma, supra; Stefanelli v. Menard,* 342 U. S. 117 (1951); *Eve Productions Inc. v. Shannon,* 439 F. 2d 1073 (8th Cir. 1971); *Overstock Book Co. v. Barry,* 436 F. 2d 1289 (2d Cir. 1970).

The order of the district court will be affirmed.

JUDGMENT OF THE U. S. COURT OF APPEALS.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was submitted under Third Circuit Rule 12(6).

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 25, 1971, be, and the same is hereby affirmed, with costs taxed against appellants.

ATTEST:
/s/ THOMAS F. QUINN,
Clerk.

May 19, 1972

STAY OF MANDATE.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 71-1633/71-1634.

RIALTO THEATRE COMPANY, A DELAWARE CORPORATION AND RICHARD F. LEWIS, JR.,

v.

CITY OF WILMINGTON, A DELAWARE MUNICIPAL CORP. HARRY G. HASKELL, JR., MAYOR OF THE CITY OF WILMINGTON, WILLIAM J. O'ROURKE, SAFETY COMMISSIONER OF THE CITY OF WILMINGTON AND JOHN T. Mc COOL, CHIEF OF POLICE OF THE CITY OF WILMINGTON,

RIALTO THEATRE COMPANY,
Appellant in No. 71-1633,

RICHARD F. LEWIS, JR.,
Appellant in No. 71-1634.

(D. C. CIVIL ACTION No. 3863)

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until September 22, 1972.

JOHN J. GIBBONS,
Circuit Judge.

Dated: July 6, 1972

Supreme Court of the United States

No. A-278.

RIALTO THEATRE COMPANY, ET AL.,
Petitioners,

v.

CITY OF WILMINGTON, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 13, 1972.

/s/ William J. Brennan, Jr.,
Associate Justice of the Supreme Court of the United States.

Dated this 10 day of
September, 1972.

Received
Sep 20, 1972

STAY OF MANDATE.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 71-1633/71-1634.

RIALTO THEATRE COMPANY, A DELAWARE CORPORATION AND RICHARD F. LEWIS, JR.,

v.

CITY OF WILMINGTON, A DELAWARE MUNICIPAL CORP. HARRY G. HASKELL, JR., A MAYOR OF THE CITY OF WILMINGTON, WILLIAM J. O'ROURKE, SAFETY COMMISSIONER OF THE CITY OF WILMINGTON AND JOHN T. MC COOL, CHIEF OF POLICE OF THE CITY OF WILMINGTON,

RIALTO THEATRE COMPANY,
Appellant in No. 71-1633,

RICHARD F. LEWIS, JR.,
Appellant in No. 71-1634.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until November 13, 1972.

JOHN J. GIBBONS,
Judge.

Dated: September 25, 1972

ORDER DENYING PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1633 AND 71-1634.

RIALTO THEATRE COMPANY, A DELAWARE CORPORATION, AND RICHARD F. LEWIS, JR.

v.

CITY OF WILMINGTON, A DELAWARE MUNICIPAL CORP., HARRY G. HASKELL, JR., MAYOR OF THE CITY OF WILMINGTON, WILLIAM J. O'ROURKE, SAFETY COMMISSIONER OF THE CITY OF WILMINGTON, AND JOHN T. McCOOL, CHIEF OF POLICE OF THE CITY OF WILMINGTON

RIALTO THEATRE COMPANY,
Appellant in No. 71-1633,

RICHARD F. LEWIS, JR.,
Appellant in No. 71-1634.

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN and HUNTER, *Circuit Judges.*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,
JOHN J. GIBBONS, *Judge.*

Dated: June 16, 1972

DEC 5 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-709.

RIALTO THEATER COMPANY,
a Delaware Corporation, and
RICHARD F. LEWIS, JR.,

Petitioners,

v.

CITY OF WILMINGTON, a Delaware Municipal Corporation, HARRY G. HASKELL, JR., Mayor of the City of Wilmington, WILLIAM J. O'ROURKE, Safety Commissioner of the City of Wilmington, and JOHN T. McCOOL, Chief of Police of the City of Wilmington,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION.

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Wilmington, Delaware 19801
Counsel for Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-709.

RIALTO THEATRE COMPANY, A DELAWARE CORPORATION, AND RICHARD F. LEWIS, JR.,

Petitioners,

v.

CITY OF WILMINGTON, A DELAWARE MUNICIPAL CORPORATION, HARRY G. HASKELL, JR., MAYOR OF THE CITY OF WILMINGTON, WILLIAM J. O'ROURKE, SAFETY COMMISSIONER OF THE CITY OF WILMINGTON, AND JOHN T. McCOOL, CHIEF OF POLICE OF THE CITY OF WILMINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Appeals is reported at 460 F. 2d 281 (1972) and appears in the Appendix to the Petitioner's Petition (A19).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

May a Federal Court order a litigant to keep evidence safely, originally seized but ordered returned to him (Order of March 31, 1970 App. A1 of Petition), and return said evidence to the State to aid in the prosecution of criminal offenses even though the evidence allegedly belongs to another not a party to the litigation where the litigant has not made a special issue of his alleged lack of possession of the evidence in pending State Court litigation and the alleged owner has not sought to intervene at any stage of either the State or Federal litigation in order to protect his alleged rights?

STATEMENT OF THE CASE.

The Respondents adopt the Petitioner's statement of the case except the statements in the third paragraph thereof that the films seized were licensed by the Petitioners and that a licensing agreement required their return within a very short period. There is nothing affirmative in the record to show whether this statement is true or not for the alleged licensing agreement has not been made a part of the record. Furthermore, the statement that the District Court held in substance that the return of the films to Petitioners vindicated their first amendment rights does not find support in the Court's order nor anywhere else in the record. What the District Court held on March 31, 1970 (App. A1, A2 of Petition), and again (Opinion of May 21, 1970 attached), was that the Respondents should return the seized films to the Petitioner, said films to be held by the Petitioner and to be made available to the Respondents upon request for use in the preparation for trials of criminal cases involving said films.

REASONS FOR DENYING THE WRIT.

I.

The Decision Below Is Clearly Correct.

The decision made as set forth in the lower court's opinion is a correct one and well supported by the cases as cited in the opinion (App. A19 of Petition). The alleged license is not of record, the Petitioners have made no special issue of their alleged lack of possession of the films in the pending State Court litigation and the alleged owners, nameless in the record, have not intervened to protect their rights. If indeed the Petitioner Lewis has let these films escape he did so at his peril for he was only acting as a custodian of the evidence for the Municipal Court pursuant to the District Court's order of March 31, 1970. His possession was permitted to continue only until such time as the City Solicitor required it for prosecution against him. Even this limited right of possession ceased when the City Solicitor subpoenaed the films for use in trial preparation. The trailers were subpoenaed on May 14, 1970 by the City Solicitor at which time Petitioner Lewis was subpoenaed to appear before the City Solicitor or an Assistant City Solicitor to bring the subject trailer films with him for the City Solicitor to prepare for an up-coming criminal trial. Lewis ignored the subpoena and did not appear with the trailer films nor did he give any reason for ignoring the subpoena and he did not apply for relief because the trailers were not in his possession. As a result, he is now under prosecution for contempt in the State courts. In addition, the basic charge on which Lewis was arrested in March, 1970, is still pending in the Municipal Court of the City of Wilmington.

II.

There Is No Conflict in the Decisions.

At page 4 of the Petition, the Petitioners cite *Metzger v. Pearcy*, 393 F. 2d 202 (C. A. 7) and *Tyrone Inc. v. Wilkinson*, 410 F. 2d 639 (C. A. 4) and state that in the cited cases the films ordered re-delivered to the local prosecuting authorities were owned by the exhibitors. In *Metzger*, the Plaintiff, an exhibitor, was the owner of the films and he was a party litigant. In *Tyrone*, as here, the Plaintiffs were not the owners of the films but the owner and manager of the theater in which the films were being shown. The lower court's decision was based on *Metzger* and *Tyrone* and certainly there is no conflict in the decisions. *Thompson v. City of Louisville*, 362 U. S. 199, cited by Petitioners, is inapposite. The case makes reference to there being a lack of evidentiary support for the lower courts ruling. The Petitioners say that the record here demonstrates an absence of both ownership and control. This is, of course, incorrect and points up the basic weakness of the Petition. The record is not clear and the Petitioners nor the alleged owners have done nothing to make it clear. If this Court were to issue certiorari it would constitute an interference with the pending state court proceeding contrary to the *Younger v. Harris* series.

III.

There Is No Important Question of Federal Law Involved.

The question as phrased by the Petitioners can affect only these litigants and as to them has but limited application.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

CLEMENT C. WOOD,
252 Public Building,
Wilmington, Delaware. 19801
Counsel for Respondents.

ORDER OF U. S. DISTRICT COURT.

Dated May 21, 1970.

And Now to Wit this 21st day of May, 1970, plaintiffs' application for a preliminary injunction and for other relief pursuant to its amended and supplemental complaint filed April 13, 1970, having come on for a hearing on May 18, 1970, after notice, and the Court having considered the amended and supplemental complaint, the affidavits and memoranda filed, and heard counsel for the respective parties, and finding that it has jurisdiction of this action under 28 U. S. C. §§ 1343(3), 43 U. S. C. § 1983, and under the First, Fourth and Fourteenth Amendments of the United States Constitution, Hague v. C. I. O., 307 U. S. 496 (1939); Douglas v. Jeannette, 319 U. S. 157 (1943), it is

Ordered

1. Plaintiffs' application for preliminary injunction enjoining the prosecution of plaintiff Lewis in the Municipal Court of the City of Wilmington for the violation of "An Ordinance Prohibiting Obscene Writings, Pictures, Publications, Plays, Dances, or The Exhibition Of Obscene Material" of the City of Wilmington (Sub. No. 1 to Ord. 69-166), approved January 23, 1970, is hereby denied for the following reasons that on the present record (a) plaintiffs have failed to establish that the prosecution of Lewis has been undertaken in "bad faith", Dombrowski v. Pfister, 380 U. S. 479 (1965); (b) in light of this Court's finding in par. 2, *infra*, that the Wilmington Obscenity Ordinance is on its face Constitutionally valid, the good faith prosecution of plaintiff under this valid ordinance will not result in "irreparable injury". Cameron v. Johnson, 390 U. S. 611 (1968). The Constitutional claims raised can be determined "as readily in the criminal case as in a suit for an injunction" Douglas v. Jeannette, 319 U. S. 157, 163 (1943);

Milky Way Productions, Inc. v. Leary, 305 F. S. 288 (S. D. N. Y. 1970), aff'd United States Supreme Ct. 38 L. W. 3335 (1970).

2. Plaintiffs' prayer for a declaratory judgment that the Wilmington Obscenity Ordinance is null and void on its face because it does not provide an adversary judicial hearing prior to this seizure of alleged obscene material is also denied. The challenged ordinance, which follows the language of the United States Supreme Court in Roth v. United States, 354 U. S. 476 (1957) provides an adequate standard for judging the alleged obscenity of the material in question. Grove Press Inc. v. City of Philadelphia, footnote 8, 418 F. 2d 82, 89 (C. A. 3, 1969). Concerning the failure of the ordinance to include a specific requirement of a prior adversary hearing, this Court, in the light of governing decisions by the United States Supreme Court and the Court of Appeals for this Circuit, already has determined that such a prior adversary hearing is necessary before material alleged to be obscene can be seized. A Quantity of Books v. Kansas, 378 U. S. 205 (1964); Cambist Films, Inc. v. Duggan, 420 F. 2d 687 (C. A. 3, 1969). There is no reason to expect that the Delaware state courts henceforth, after having the opportunity to consider the issues raised by plaintiffs, will not abide by the Constitutional requirement that an adversary hearing be held before seizing allegedly obscene material. The failure to include the requirement of a prior adversary hearing in the ordinance does not render the ordinance invalid because the State courts can be expected to fashion appropriate procedures to satisfy the Constitutional requirement of a prior adversary hearing. Gable v. Jenkins, 309 F. Supp. 998, footnote 3 (N. D. Ga. 1969), aff'd U. S. Supreme Ct. 38 L. W. 3401 (1970).

3. Plaintiffs' request to amend paragraph 3 of this Court's order of March 31, 1970, as further clarified by

order of this Court dated April 28, 1970, is hereby denied. Plaintiffs have already taken an interlocutory appeal from that paragraph of the Court's order; such filing of an appeal removes the jurisdiction of this Court to modify the order. Plant Economy Inc. v. Mirror Insulation Co., 308 F. 2d 275 (C. A. 3, 1962); Keohane v. Swarco, Inc., 320 F. 2d 429 (C. A. 6, 1963); 9 Moore, Federal Practice, p. 734. While lacking the power to modify the order, the Court should emphasize again, as it did in the order of April 28, 1970, that this Court has in no way ruled on the admissibility of the film trailers in any state court proceeding. Further, it was not the intention of the Court in its prior order to intervene affirmatively in the prosecution of the state criminal action. Rather, the intent was to insure that the plaintiff would take no affirmative step to place the film trailers in question beyond the reach of the state courts of Delaware.

JAMES L. LATCHUM,
United States District Judge.